Robert John
Law Office of Robert John
P.O. Box 73570
Fairbanks, Alaska 99707
907-456-6056/907-456-6057 (FAX)
Attorney for John William McKelvey III

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN WILLIAM McKELVEY III,	)	
	)	
Appellant,	)	
	)	
vs.	)	Court of Appeals No. A-12419
	)	
STATE OF ALASKA,	)	
	)	
Appellee.	)	
	)	

Trial Court Case No. 4FA-14-00040 CR

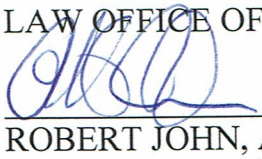
APPELLANT'S OPENING BRIEF

VRA Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

APPEAL FROM THE SEPTEMBER 17, 2015 JUDGMENT OF THE SUPERIOR COURT, THE HONORABLE BETHANY HARBISON, PRESIDING

LAW OFFICE OF ROBERT JOHN



ROBERT JOHN, ABA No. 8911069
P.O. Box 73570
Fairbanks, AK 99707
907-456-6056
Attorney for Appellant John William McKelvey III

Filed in the Court of Appeals of the State of Alaska, this 20th day of March, 2017.

Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

CONSTITUTIONAL PROVISIONS RELIED UPON

Alaska Constitution
§14. Searches and Seizures
The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§22. Right of Privacy
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

United States Constitution
Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

LIST OF TRIAL COURT IMAGES CITED

R. 63-86, 89, 114, 275-276, 295-297, 334-351, 466, 499-534, and 536-537.

LIST OF TRANSCRIPT PAGES CITED

Tr. 25-27, 29-30, 35, 39, 64, 74-75, 93-94, 105-108, 125-126, 228-233, 247-248, and 316-322.

JURISDICTIONAL STATEMENT

John William McKelvey III (McKelvey) appeals from the judgment of the superior court entered September 17, 2015.[1] This Court has jurisdiction pursuant to AS 22.07.020(c) and Appellate Rule 202(b).

STATEMENT OF THE ISSUES PRESENTED

1. Was McKelvey's right to privacy under the Fourth Amendment to the United States Constitution violated when the police engaged in a targeted warrantless search of the curtilage of McKelvey's home by taking photographs of the curtilage with a high-powered telephoto-lens camera from an airplane flying above McKelvey's home?

2. Was McKelvey's right to privacy under Article I, §§14 and 22 of the Alaska Constitution violated when the police engaged in a targeted warrantless search of the curtilage of McKelvey's home by taking photographs of the curtilage with a high-powered telephoto-lens camera from an airplane flying above McKelvey's home?

STATEMENT OF THE CASE

This case arises from the execution of Search Warrant No. 4FA-12-352 SW.[2] On August 27, 2012, Alaska State Trooper Investigator Joshua Moore (Investigator Moore or Moore) applied for and received the warrant; it was executed the next day.[3]

In applying for the search warrant, Investigator Moore attested that he had received a phone call from an informant on August 22, 2012 at 1:09 p.m., during which

---

[1] R. 275-276.
[2] R. 82-85.
[3] R. 82-85.

the informant stated that he or she had been to McKelvey's property and had seen a marijuana grow there.[4] Despite the fact that the directions for completing the search warrant application specifically indicate that the affiant is to state when the informant made his or her observations,[5] Investigator Moore failed to do so.[6] Investigator Moore's affidavit continued:

> The informant stated that the plants were located in plastic five gallon buckets and were sitting in the sun. The informant also stated that McKelvey had greenhouses on the property where he would move the plants to at night. The informant estimated that there were 30 marijuana plants outside where the informant could see the plants.[7]

In his affidavit Investigator Moore attempted to establish the credibility or veracity of the informant. In that regard, Investigator Moore stated:

> The informant was used in one prior unrelated purchase of controlled substances and the informant in that case was deemed credible. Information from the informant about dealers of controlled substances in the Fairbanks Area has also been deemed to be credible by law enforcement independent of the informant. The informant has numerous crimes of dishonesty which have been attached to the affidavit. The informant is currently working with law enforcement for consideration on pending charges.[8]

Two days later at 2:00 p.m., Investigator Moore had a wildlife trooper fly him over McKelvey's property in an attempt to verify the informant's statements. The flyover, however, refuted the informant's statement that there were approximately thirty plants sitting in the sun, and thus there was no incriminating evidence observed during the

---

[4] R. 89.
[5] R. 86.
[6] R. 89.
[7] R. 89.
[8] R. 89.

flyover.[9] The most Investigator Moore could say was that he thought he could see "what appeared to be plants potted inside five gallon buckets located inside" a "partially see through" greenhouse.[10] Although Investigator Moore indicated that he had attached to his affidavit photographs of McKelvey's property taken during the flyover,[11] Investigator Moore attached only a black-and-white photocopy of a single photograph.[12]

McKelvey moved to suppress all evidence obtained via execution of the search warrant. McKelvey asserted two principle bases for doing so: (1) that the failure of Investigator Moore's affidavit to indicate when the informant had made his or her purported observations renders the information stale or is otherwise fatal to the affidavit; and (2) that the affidavit fails to establish the veracity or credibility of the informant as required by the Aguilar-Spinelli test which was adopted under the Alaska Constitution in State v. Jones, 706 P.2d 317 (Alaska 1985).[13]

After oral argument on McKelvey's motion, the trial court, Judge Harbison, ruled that although the warrant was silent as to when the informant made his or her observations, that problem was cured by the fact that the flyover happened only two days after the informant's call and during the flyover Investigator Moore observed what he thought were five-gallon buckets with plants in them in a translucent greenhouse.[14] Similarly, the trial court ruled that although the warrant's conclusory assertions of the

---

[9] R. 89.
[10] R. 89.
[11] R. 89.
[12] R. 114.
[13] R. 63-81.
[14] Tr. 25-27, 29-30.

informant's credibility failed to meet that prong of Aguilar-Spinelli, Investigator Moore's observations of what he thought were plants in five-gallon buckets in a greenhouse brought the warrant over the veracity threshold.[15]

In view of the flyover basis for the trial court's upholding the search warrant, McKelvey then moved to suppress all evidence arising from the flyover and thus from the search warrant itself.[16] McKelvey asserted, inter alia, that utilizing a high-powered telephoto-lens camera to take photographs of the curtilage of McKelvey's home from an airplane flying overhead is an illegal warrantless search that violated McKelvey's rights to privacy under the Fourth Amendment to the United States Constitution and Article I, §§14 and 22 of the Alaska Constitution.[17]

At the evidentiary hearing on McKelvey's motion, the pilot of the plane, Alaska Wildlife Trooper Lieutenant Justin Rodgers (Lieutenant Rodgers or Rodgers), testified that at no time when the plane was in the vicinity of McKelvey's property was it flying at less than 600 feet above the ground.[18] This was corroborated by the photographer on the plane, Investigator Moore, who estimated the plane to be flying even higher than 600 feet above the ground in the vicinity of McKelvey's property.[19]

Investigator Moore acknowledged that he used a Canon camera with a high-powered telephoto lens to take photographs of McKelvey's property during the flyover.[20] The camera magnified what one could see with the naked eye by approximately nine

---

[15] Tr. 25-27, 29-30.
[16] R. 499-500.
[17] R. 501-534.
[18] Tr. 35, 39, 64.
[19] Tr. 74-75, 125-126, 247-248.
[20] Tr. 93-94, 107-108.

times.[21] Indeed, Investigator Moore did not make any naked-eye observations when flying above McKelvey's property but rather relied exclusively on the photographs themselves,[22] which coupled with the informant's statements triggered Investigator Moore to seek the warrant.[23]

In contrast to Lieutenant Rodgers and Investigator Moore, McKelvey testified that the plane flew much lower, approximately 300 to 400 feet above the ground. This was based upon McKelvey being home at the time of the flyover trying to get his vehicle started, which was corroborated by the aerial photographs of his vehicle with its hood open.[24]

McKelvey acknowledged that there is a small private airport a mile or so from his home at the end of the road.[25] However, planes from that airport have never flown near his home, and those planes he has seen flying to and from the Chena Hot Springs Resort have flown several times higher than the very loud plane that startled him that day in an unprecedented way.[26]

McKelvey also testified as to his actual expectation of privacy at his property located in a sparsely-populated area approximately twenty miles from Fairbanks. McKelvey posted numerous "No Trespassing" and "Keep Out" signs along his driveway

---

[21] R. 521-522, 528-534; Tr. 107-108.
[22] Tr. 105-106.
[23] R. 89. As part of the stipulated facts in this case, the parties have agreed that, "Prompted by what Investigator Moore observed on McKelvey's property during the flyover, combined with prior information from a confidential informant, Investigator Moore decided to seek a search warrant for McKelvey's property." R. 295.
[24] Tr. 229-231; R. 537.
[25] Tr. 231-232.
[26] Tr. 231-232; R. 537.

and elsewhere on his property and had a gate he locked when he was away from the home.[27]

McKelvey's greenhouse where the marijuana was being grown was immediately behind his home, unobservable to anyone coming to visit his home and proceeding to the entry to the home at its front door.[28] Along with McKelvey's greenhouse was a shop behind the home, the entire area comprising part of the curtilage of McKelvey's home.[29]

Several weeks after the evidentiary hearing, the trial court rendered its decision denying McKelvey's motion to suppress evidence arising from the flyover.[30] The trial court found that the two Troopers flew over McKelvey's property to gather information to corroborate the statement of the confidential informant concerning a marijuana grow there.[31] The trial court found that in the course of so doing, the two never flew below 600 feet.[32] And as to the photography itself, the trial court found:

> During the flight, Rodgers flew near McKelvey's property but not directly over it, so that Moore could get a vantage point suitable for photographs of the property. While flying near the property, Moore took photographs with a Canon EOS 7D, with the lens set to 280mm magnification in the resulting photos.[33]

As to McKelvey's actual expectation of privacy, the trial court found that the greenhouse was approximately 10 to 15 feet behind the home in an area "surrounded by a natural sight-barrier of tall woods," and unobservable from the ground by anyone who

---

[27] Tr. 228-229; R. 536.
[28] Tr. 228-229; R. 536.
[29] Tr. 228-230, 233; R. 536.
[30] R. 334-351.
[31] R. 334-335.
[32] R. 335.
[33] R. 335.

proceeded to McKelvey's front door and otherwise heeded the "KEEP OUT" and "NO TRESPASSING" signs which were "all throughout the barrier to the property."[34] The trial court thus found that "the greenhouse is part of the curtilage and enjoys the same level of privacy and protection from warrantless searches and seizures as other parts of McKelvey's home would."[35]

In its legal analysis of McKelvey's claims, however, the trial court reasoned that "whether or not Mr. McKelvey's semi-opaque greenhouse was located in the curtilage is irrelevant."[36] In essence, the trial court concluded that McKelvey did not have a reasonable expectation of privacy under either the United States or the Alaska Constitution even though Investigator Moore used the telephoto-lens camera to magnify the greenhouse for the purposes of the police investigation.[37] Investigator "Moore's use of a telephoto lens to see objects on McKelvey's property more clearly is as an assisted plain view observation."[38]

In its Alaska constitutional analysis, the trial court also reasoned that it was relevant that in Alaska public use of small aircraft is commonplace, as is tourism-and-hunting-related aerial photography with visual magnification, and there are numerous small private airports such as the one approximately a mile from McKelvey's home.[39] Ultimately, the trial court then concluded that because Investigator Moore took the photographs from an area outside of McKelvey's curtilage and did so with a publicly-

[34] R. 342.
[35] R. 342.
[36] R. 342.
[37] R. 342-351.
[38] R. 347.
[39] R. 349-350.

available camera, McKelvey did not have a reasonable expectation of privacy and thus no search occurred for either the purposes of the Fourth Amendment or the purposes of Article I, §§ 14 and 22 of the Alaska Constitution.[40]

Subsequently the parties appeared before the trial court for a trial on stipulated facts.[41] At that trial, based upon the evidence obtained via the execution of the search warrant Investigator Moore obtained, McKelvey was convicted of one count of possessing methamphetamine with intent to distribute and one count of possessing a firearm in furtherance of that crime.[42] This appeal follows.

STANDARDS OF REVIEW

Whether an individual's subjective expectation of privacy against a warrantless search of his or her person or property is objectively reasonable under either the Fourth Amendment or Article I, §§14 and 22 of the Alaska Constitution or both is a question of law which this Court will determine de novo, adopting the constitutional rule that is most persuasive guided by precedent, reason, and policy.[43]

It is a "fundamental principle that the product of an unlawful search cannot provide probable cause for the later issuance of a search warrant."[44] Thus, a search warrant obtained through the use of illegally-obtained evidence will be invalidated if the

---

[40] R. 350-351.
[41] Tr. 316-317; R. 295-297.
[42] Tr. 316-322; R. 275, 295-297.
[43] See Beltz v. State, 221 P.3d 328, 332 (Alaska 2009).
[44] Schmid v. State, 615 P.2d 565, 575 (Alaska 1980) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

untainted evidence does not in and of itself establish probable cause or if the acquisition of the illegally-obtained evidence prompted the police decision to seek the warrant.[45]

ARGUMENT

I. McKelvey's Right To Privacy Under The Fourth Amendment To The United States Constitution Was Violated When The Police Engaged In A Targeted Warrantless Search Of The Curtilage Of McKelvey's Home By Taking Photographs Of The Curtilege With A High-Powered Telephoto-Lens Camera From An Airplane Flying Above McKelvey's Home.

In California v. Ciraolo, while flying at an altitude of 1000 feet in public airspace, law enforcement was able to "observe plants readily discernable to the naked eye as marijuana" in the defendant's outdoor, uncovered, marijuana garden.[46] The Court determined that the garden was indeed within the curtilage of the defendant's home[47] but noted that "what person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection"[48] and that law enforcement is not "required to shield their eyes when passing by a home on public thoroughfares."[49] The Court then determined that because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed," the defendant had not manifested an expectation of privacy that society was prepared to

---

[45] See id.; Mathis v. State, 778 P.2d 1161, 1166 (Alaska App. 1989).
[46] California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).
[47] Persons and property within the curtilage of one's home are entitled to the same constitutional protection as though they were within the home itself. See Florida v. Jardines, _____ U.S. _____, 133 S.Ct. 1409, 1414, 185 L.Ed.2d 495 (2013).
[48] Ciraolo, 476 U.S. 213 (quotations and citations omitted).
[49] Id.

recognize as reasonable.[50] "The Fourth Amendment simply does not require the police traveling the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."[51]

The fact that the observations made by law enforcement were through the naked eye is key to the holding of Ciraolo. In his Opinion for the Court, Chief Justice Burger repeatedly states that the police observations were through the naked eye and also points out that the camera used by the police was "a standard 35mm camera."[52] Moreover, in concluding Chief Justice Burger notes, "The State acknowledges that aerial observations of the curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens."[53]

The same day that the Court rendered its decision in Ciraolo, it also rendered its decision in Dow Chemical.[54] The Court's decision upholding the aerial surveillance in Dow Chemical is premised on the fact that although the flyover did involve technologically-enhanced photography, the photography was not of the curtilage of one's home but was rather of a 2000-acre industrial complex.[55] The Court expressly emphasized that the case did not concern the curtilage:

---

[50] Id. at 213-14. Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, filed a vigorous dissent. See Ciraolo, 476 U.S. at 215-26 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).
[51] Id. at 215 (emphasis added).
[52] Id. at 209 (quotation and citation omitted).
[53] Id. at 215 n. 3 (quotation, citation, and brackets omitted).
[54] Dow Chemical Company v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).
[55] See Dow Chemical, 476 U.S. at 236-39.

> We find it important to note that this is not an area immediately adjacent to a private home where privacy expectations are most heightened.[56]

Three years following Ciraolo and Dow Chemical, the Court considered another case of flyover surveillance in Florida v. Riley. In Riley, both the four-Justice plurality[57] and Justice O'Connor's concurrence[58] relied upon the fact that the police observations were performed with the naked eye, and the plurality concluded that because the police remained within the publicly-navigable airspace, the case was controlled by Ciraolo.[59]

Toward the beginning of this Millennium, the Court was presented in Kyllo v. United States with a case that did not involve aerial police observations but rather involved ground-level, public-street police observations using specialized technology not generally available to the public.[60] In rendering the Opinion of the Court, Justice Scalia was clear that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not have been obtained without physical intrusion into a constitutionally protected area constitutes a search -- at least where. . . the technology in question is not in general public use."[61] The Kyllo Court thus ruled that the police use of thermal-image scanning of the defendant's home was a search, for which a warrant was required.[62] Furthermore, the Court in Kyllo reiterated that the "enhanced aerial

---

[56] Id. at 237 n. 4 (emphasis in original).
[57] See Florida v. Riley, 488 U.S. 445, 448-49, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (plurality opinion).
[58] See id. at 455 (O'Connor, J., concurring in the judgment).
[59] See id. at 449-52 (plurality opinion).
[60] See Kyllo v. United States, 533 U.S. 21, 29-30, 33-34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).
[61] Id., 533 U.S. at 34 (quotation and citation omitted) (ellipsis added).
[62] Id. at 40.

photography" in Dow Chemical was upheld because it did not involve the curtilage.[63] And the Kyllo Court likewise emphasized that the Court's focus on Ciraolo was "upon otherwise-imperceptibility, which is precisely the principle we vindicate today."[64]

Applying the holdings and principles of Ciraolo, Dow Chemical, Riley, and Kyllo, the police photography of McKelvey's curtilage from the airspace overhead using a high-powered telephoto-lens camera is a search requiring a warrant. This is true for two basic and simple reasons: The police photography involved McKelvey's curtilage and it revealed what was imperceptible to the naked eye from the airspace occupied by the police.

Investigator Moore did not use a 35mm camera, as the police employed in Ciraolo.[65] Instead, Investigator Moore employed a telephoto lens set to 280mm magnification.[66] While a 50mm lens is comparable to what one would observe with his or her naked eye, a 280mm lens enhances what is visible to the naked eye to be approximately 5.6 times greater than what one would observe with his or her natural senses.[67] However, the Canon camera at issue has a multiplying factor of 1.6 so that what one observes through that lens is more or less nine times greater than what one observes through the naked eye.[68]

---

[63] Id. at 33.
[64] Id. at 38 n. 5.
[65] See Ciraolo, 476 U.S. at 209.
[66] R. 335.
[67] R. 528 (www.dpreview.com/glossary/optical/focal-length).
[68] R. 529-533 (www.digitalcameraworld.com/2012/09/07/what-is-focal-length-definition-comparison-every-question-answered/); R. 534 (specifications from Canon website).

In sum, observations obtained through a 280mm lens are not obtained through the naked eye; nor can they be said to be unaided and solely a result of one's natural senses as a 280mm lens is indeed a "sense-enhancing technology." The use of a sophisticated sense-enhancing lens, paired with an on-demand airplane, is simply not technology that is of general public use, and even if it were, what matters under Ciraolo and Dow Chemical is that law enforcement observed McKelvey's curtilage from the airspace overhead and did so with a device that reveals more than could be seen by the naked eye.

II. McKelvey's Right To Privacy Under Article I, §§14 And 22 Of The Alaska Constitution Was Violated When The Police Engaged In A Targeted Warrantless Search Of The Curtilage Of McKelvey's Home By Taking Photographs Of The Curtilage With A High-Powered Telephoto-Lens Camera From An Airplane Flying Above McKelvey's Home.

Early in this State's history the Alaska Supreme Court declared: "To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities."[69] As Justice Connor noted in Baker v. City of Fairbanks, Alaska's appellate courts are "under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."[70] In Breese v. Smith, the Court added that while some of the terms in the Alaska Constitution parallel those of the United States Constitution, "we have repeatedly held that this court is not obliged to interpret our

[69] Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).
[70] Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970).

constitution in the same manner as the Supreme Court of the United States has construed parallel provision of the United States Constitution."[71]

Alaska's right to privacy may be "one of the most well-known indicators of Alaska's judicial independence."[72] Those who proposed and advocated for Article I, §22 saw the constitutional amendment as a way to ensure "that we have a possible defense to invasion of privacy."[73] Article I, §22 advocates anticipated that "we are moving into an electronic age and this will give a measure of protection and would prevent excesses in this field."[74] Article I, §22 was proposed, passed, and adopted by the citizens of Alaska with the future interest of Alaskans in mind. The amendment serves as a pre-emptive check on the looming threat advances in technology pose to Alaskans' sense of privacy.

The Alaska Supreme Court's decision in Cowles[75] compels this Court to reverse the trial court's decision. While the Cowles Court narrowly upheld warrantless overhead video recording of a public employee in her workplace, neither the three-Justice majority nor the two-Justice dissent in Cowles disputed the intrusiveness of the police recording visual images from an overhead vantage point.[76] Rather, the Court's decision in Cowles

---

[71] Breese v. Smith, 501 P.2d 159, 167 (1972).

[72] Ronald L. Nelson, Welcome To The "Last Frontier," Professor Gardener: Alaska's Independent Approach to State Constitutional Interpretation, 12 Alaska L. Rev. 1, 17 (1995).

[73] R. 466 (Alaska House Judiciary Committee: Minutes of The Meeting, May 30, 1972).

[74] Id.

[75] Cowles v. State, 23 P.3d 1168 (Alaska 2001).

[76] Cf. State v. Page, 911 P.2d 513, 516-17 (Alaska App. 1996) (Alaska's Constitution protects Alaskans from warrantless "surreptitious photography or videotaping" of private activities because such governmental action has the same "corrosive impact on our sense of security" as the warrantless recording of conversations that was prohibited in State v. Glass, 583 P.2d 872 (Alaska 1978)), petition for hearing dismissed as improvidently granted, 832 P.2d 1297 (Alaska 1997).

turned on the essentially-public nature of her workspace, the presence of numerous passersby, and the fiduciary nature of her employment involving handling financial transactions so that one's reasonable privacy expectations were minimal if any at all.[77] In contrast, the overhead recording of visual images in McKelvey's case concerns the core of privacy -- the curtilage of one's home -- plus the visual images here were enhanced by the telescopic, zoom lens employed by the police.

Furthermore, in her Cowles dissent, Justice Fabe referred to a situation akin to that in McKelvey's case. Discussing People v. Romo,[78] Justice Fabe observed that one's right to privacy would be violated where law enforcement agents fly over a person's home "using electronic aids for observation."[79]

McKelvey testified that the police flyover of his property was unprecedented.[80] There is no evidence of previous similar flight activity over his property, and there is certainly no evidence that any tour operator offers "curtilage excursions." Rather, whether tourist or hunter, a person flying over the vast expanse of Alaska is seeking to view what are essentially open public lands -- the antithesis of an enclosed curtilage such as McKelvey's.

---

[77] See Cowles, 23 P.3d at 1172-73.
[78] People v. Romo, 243 Cal. Rptr. 801 (Cal. App. 1988).
[79] Cowles, 23 P.3d at 1183 (Fabe, J., joined by Bryner, J., dissenting); cf. State v. Cord, 693 P.2d 81, 84 (Wash. 1985) (aerial surveillance from a lawful vantage point without visual enhancement devices is not a search under the Washington Constitution); State v. Wilson, 988 P.2d 463, 465-66 (Wash. App. 1999) (same).
[80] R. 537; Tr. 231-232.

Consistent with Cowles and Alaska's independent tradition of ordered liberty, this Court should adopt the reasoning of the four dissenting Justices in Ciraolo. As Professor LaFave explains:

> [T]he most sensible way to apply the Katz justified-expectation-of-privacy test is to characterize police surveillance as a search unless it occurs from a "public vantage point" and uncovers what the person has not protected from scrutiny by the "curious passerby." Under that approach, the Ciraolo case should have come out the other way. The fact that the aircraft was in "public navigable airspace" does show that the surveillance occurred from a "public vantage point," but that is all. As the four Ciraolo dissenters correctly observed:
>
> > the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities and might connect those activities with particular people, is simply too trivial to protect against. ***
> >
> > ***The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not just for the purpose of observing activities taking place within residential yards.[81]

In other words, the majority opinion in Ciraolo is a manifestation of what this Court has referred to as the United States Supreme "Court's surreal and Orwellian view of personal

---

[81] 2 Wayne R. LaFave Search and Seizure, §2.3(g) at 799-800 (5th ed. 2012) (footnote omitted, brackets added); see Catherine Hancock, Justice Powell's Garden: The *Ciraolo* Dissent And Fourth Amendment Protection For Curtilage-Home Privacy, 44 San Diego L.Rev. 551 (2007).

security in contemporary America,"[82] while the dissenting Justices in Ciraolo embody the ordered liberty of The Last Frontier -- the Alaskan spirit and mindset manifested in Article I, §§14 and 22 of the Alaska Constitution.

Neither this Court nor the Alaska Supreme Court have ruled on the precise issue of whether warrantless targeted, aerial surveillance of Alaska citizens violates the Alaska Constitution.[83] The appellate courts of several other states, however, have reached that conclusion under their State Constitutions.

In line with the Ciraolo dissent and with Alaska jurisprudence is the decision in People v. Cook, wherein the California Supreme Court determined that under the California Constitution "an individual has a reasonable expectation of privacy from purposeful police surveillance from the air."[84] Therefore, the Court held that "the warrantless aerial scrutiny of defendant's yard, for the purpose of detecting criminal activity by the occupants of the property, was forbidden by Article I, Section 13 of the California Constitution."[85]

This Court need not render a ruling as broad as that in Cook, though the broad and bedrock privacy protections of the Alaska Constitution would seem to require the same. Rather, the Court need merely rule that the enhanced visual observation and photo-recording by the police during the flyover of McKelvey's property is prohibited by Article I, §§14 and 22 of the Alaska Constitution. As matters presently stand, however,

---

[82] Joseph v. State, 145 P.3d 595, 604 (Alaska App. 2006) (quotation and citation omitted).
[83] See Thiel v. State, 762 P.2d 478, 484 (Alaska App. 1988) (noting but not deciding the issue).
[84] People v. Cook, 710 P.2d 299, 305, 221 Cal. Rptr. 499, 505 (Cal. 1985).
[85] Id., 710 P.2d at 307, 221 Cal. Rptr. at 507.

this case is in the posture Justice Fabe proclaimed in Cowles as the trial court's decision has not only misconstrued a federal constitutional guarantee but has also dramatically restricted the even-broader rights guaranteed to we who call ourselves Alaskans.[86]

In State v. Bryant, the Vermont Supreme Court found that "Vermont citizens have a constitutional right to privacy that ascends into the airspace above their homes and property."[87] Applying the Katz two-step privacy test, the Bryant Court determined that "we think it is also likely that Vermonters expect – at least at a private, rural residence on posted land – that they will be free from intrusions that interrupt their use of their property, expose their intimate actives, or create undue noise, wind or dust."[88] Thus, where the defendant had demonstrated his expectation of privacy by posting his land and communicating to a local forest official that trespassers were not allowed on his land, police observation obtained through targeted aerial surveillance was deemed to be a "patent violation of defendant's legitimate expectations of privacy."[89]

In the same vein, the New Mexico Court of Appeals recently decided that the express privacy protection embedded in its State Constitution "includes an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance."[90] Thus, the Davis Court determined that information obtained through targeted aerial surveillance of a home or its curtilage that could not have been otherwise "obtained

---

[86] See Cowles, 23 P.3d at 1185 (Fabe, J., joined by Bryner, J., dissenting).
[87] State v. Bryant, 950 A.2d 467, 470 (Vermont 2008).
[88] Id. at 478.
[89] Id. at 479.
[90] State v. Davis, 321 P.3d 955, 961 (N.M. App. 2014), affirmed on federal constitutional grounds, 360 P.3d 1161 (N.M. 2015).

without physical intrusion into that area" is a search under the New Mexico State Constitution.[91]

Even more recently, the Hawaii Court of Appeals has held that even though naked-eye police surveillance of the area around an individual's residence from a helicopter 420 feet above the ground was not a search under the Fourth Amendment, it is a search requiring a warrant under the Hawaii Constitution.[92] "Targeted aerial surveillance of a property is at odds with Hawaii's constitutional protections of individual privacy."[93] Following the reasoning of the California Supreme Court in Cook, the Quiday Court reasoned that the individual's privacy protection was especially heightened because the marijuana plants at issue were within the curtilage of the individual's home.[94] Furthermore, referring again to Cook, the Quiday Court cautioned that technological advances such as mechanical flight and electronic technologies cannot be allowed to override our steadfast constitutional protections of privacy, particularly when the police employ those technological advances in "targeted aerial surveillance of the individual's residence and its curtilage."[95]

---

[91] Davis, 321 P.3d at 961; see also Davis, 360 P.3d at 1173-85 (Chavez, J., specially concurring) (disagreeing with the majority's federal constitutional analysis and concluding that under the New Mexico Constitution an individual's reasonable expectation of privacy from aerial surveillance is co-extensive with his or her reasonable expectation of privacy from ground-level surveillance).

[92] See State v. Quiday, 377 P.3d 65, 67-72 (Hawaii App. 2016), application for writ of certiorari accepted, 2016 WL 6426440 (Hawaii 2016).

[93] Quiday, 377 P.3d at 71.

[94] See Quiday, 377 P.3d at 71-72.

[95] Id. at 72.

CONCLUSION

As the trial court concluded, the evidence presented in support of the search warrant at issue does not establish probable cause without the evidence the police obtained via the taking of photographs with a high-powered telephoto-lens camera while flying above McKelvey's property. Even if there were sufficient evidence of probable cause without the flyover evidence, the warrant is nonetheless invalid because the flyover evidence prompted the police to seek the warrant.

For the reasons stated, the decisions of the trial court should be reversed. McKelvey's convictions must thus be vacated and the charges against him must be dismissed. John William McKelvey III respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this 8th day of March, 2017.

LAW OFFICE OF ROBERT JOHN

Robert John
Alaska Bar No. 8911069
Attorney for John William McKelvey III

CERTIFICATE OF TYPEFACE

This brief was prepared in 13 point (proportionately spaced) Times New Roman in compliance with Appellate Rule 513.5(c).

Robert John